

## **LBNL – PROCUREMENT STANDARD PRACTICES**

**Section: 9 Subcontractor Qualifications**

**Subject: 9.3 Organizational Conflicts of Interest**

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**PURPOSE:** This standard practice (SP) describes the policy and procedures used by the Laboratory to address actual and potential organizational conflicts of interest (OCIs) in connection with subcontracts for advisory and assistance services.

**POLICY:** It is the policy of the Laboratory to identify and to avoid, neutralize, or mitigate OCIs before entering into subcontracts for advisory and assistance services. If an OCI cannot be avoided or neutralized, the Laboratory will either disqualify the company or obtain DOE approval prior to entering into a subcontract.

**SCOPE:** This SP applies to all subcontracts that involve or appear to involve advisory and assistance services expected to exceed the small purchase threshold or follow-on subcontracts of any dollar value involving advisory and assistance services, such as:

- Engineering or technical support services;
- Management support or professional services; and
- Studies, analyses and evaluations.

**Exclusions** The following types of work are excluded from the requirements of this SP:

- Routine information technology services, unless they are an integral part of a subcontract for the acquisition of advisory and assistance services;
- Architectural engineering services; and
- Research on theoretical mathematics and basic research involving medical, biological, physical, social, psychological, or other phenomena.

### **DEFINITIONS:**

**Advisory and Assistance Services**

Advisory and assistance services are services provided under subcontract by non-governmental sources to support or improve:

- Organizational policy development;
- Decision-making;
- Management and administration;
- Program and/or project management and administration; or
- Research and development (R&D) activities.

Advisory and assistance services can also mean the furnishing of professional advice or assistance rendered to improve the effectiveness of Laboratory management processes or

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procedures (including those of an engineering and technical nature). In rendering the foregoing services, outputs may take the form of information, advice, opinions, alternatives, analyses, evaluations, recommendations, training, and the day-to-day aid of support personnel needed for the successful performance of ongoing Laboratory operations.

### **Engineering and Technical Support Services**

Engineering and technical support services are services used to support Laboratory programs during an acquisition cycle. Such services include systems engineering (see definition below) and technical direction (see definition below) to ensure the effective operation and maintenance of a major system (as defined in OMB Circular No. A-109), or to provide direct support that is essential to research, development, production, operation or maintenance of the system.

### **Management and Professional Support Services**

Management and professional support services are services that provide assistance, advice, or training for the efficient and effective management and operation of organizations, activities (including management and support services for R&D activities), or systems. These services are normally closely related to the basic responsibilities and mission of the agency originating the requirement for the acquisition of services by contract. Included are efforts that support or contribute to improved organization of program management, logistics management, project monitoring and reporting, data collection, budgeting, accounting, performance auditing, and administrative or technical support for conferences and training programs.

### **Organizational Conflict of Interest (OCI)**

OCI is the inability, or potential inability of a subcontractor to:

- Render impartial assistance or advice to the Laboratory,
- Remain objective when performing work for the Laboratory, and/or
- Maintain a fair competitive relationship with other subcontractors as a result of performing work for the Laboratory

because of previous, present, planned, or potential financial, contractual, organizational, or other interests of the subcontractor which relate to the work performed for the Laboratory.

### **Studies, Analyses, and Evaluations**

Studies, analyses, and evaluations are services that provide organized, analytical assessments or evaluations in support of policy development, decision-making, management, or administration. Included are studies in support of R&D activities. Also included are acquisitions of models, methodologies, and related software supporting studies, analyses, or evaluations.

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### Systems Engineering

Systems engineering means services that include substantially all of the following activities:

- Determining specifications;
- Identifying and resolving interface problems;
- Developing test requirements; and
- Evaluating test data and supervising design.

### Technical Direction

Technical direction means services that include a combination of substantially all of the following activities:

- Developing work statements;
- Determining parameters;
- Directing other contractors' operations; and
- Resolving technical controversies.

## PROCEDURES:

### Decision Table

See the *OCI Process Decision Table* (Exhibit 9.3.a) for an overview of the steps involved in identifying and resolving OCI issues.

### Advisory and Assistance Services Determination

The procurement specialist will review the purchase request to determine if the proposed work involves advisory and assistance services. If the information accompanying the purchase request is insufficient to make such a determination, the procurement specialist will send a *Pre-Procurement Fact Sheet* form, available in the Formcab on the Procurement Server, to the requester and, when completed and returned, will analyze it before making the determination.

Consultants are prohibited from performing follow-on work relating to the consultant's prior findings under a Laboratory subcontract. This requirement does not apply to lower tier consultants or firms providing personal services if the amount of the award is less than 10% of the first tier Laboratory subcontract. (See SP 37.1, *Consultants and Personal Services*.)

### Documentation and Solicitation

**OCI Procedures Do Not Apply** – If the procurement specialist determines that the work does not involve advisory and assistance services, further OCI review is not required. The procurement specialist will document the subcontract file accordingly. The solicitation may then proceed without the inclusion of any OCI clauses.

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**OCI Procedures Do Apply** – If the procurement specialist determines that the work does include advisory and assistance services, the procurement specialist shall document the subcontract file accordingly.

If the award is expected to exceed the small purchase threshold, the procurement specialist shall include the *Organizational Conflicts of Interest Disclosure-Advisory and Assistance Services* clause (DEAR 952.209-8) in the solicitation and the *Organizational Conflicts of Interest* clause (DEAR 952.209-72) in the subcontract. The *Conflicts of Interest Disclosure-Advisory and Assistance Services* clause can be found in applicable RFP General Provisions, and the *Organizational Conflicts of Interest* clause is included in the appropriate General Provisions documents. Both clauses can be found in the Procurement Formcab.

**Multi-phase Projects** – If a multi-phase project is contemplated, such as a pilot or prototype to be followed by full implementation, any subcontract should cover all potential phases of the project with appropriate language reserving the Laboratory's discretion to proceed or not proceed with full implementation.

### **Obtaining the OCI Disclosure**

After evaluating all proposals, the procurement specialist will request that the apparent successful Offeror submit the statement required by the *Organizational Conflicts of Interest Disclosure – Advisory and Assistance Services* clause.

### **Determining Whether an OCI Exists**

In consultation with the requester, the procurement specialist will thoroughly review all information that might indicate the presence of an OCI. Such information may include, but is not limited to the:

- *Pre-Procurement Fact Sheet* form;
- Statement of work;
- Offeror's proposal;
- OCI Disclosure statement;
- Résumés of Offeror's key personnel;
- Work that the Offeror has done, is doing, and plans to do for others; and
- Annual report/10K report.

All relevant facts shall be reviewed and evaluated to determine whether an actual or potentially significant OCI exists with respect to a particular offer, or whether there is little or no likelihood that such an OCI exists. This determination should be made in the light of common sense and good business judgment

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based upon all the relevant facts and the work to be performed.

The following questions should be considered when evaluating the collected documents for a potential OCI:

- Are there conflicting roles which might bias a subcontractor's judgment in its work for the Laboratory?
- Did something take place in the past that gives the offeror an unfair advantage in the current subcontract?
- Is the current subcontract scope of work the end product of the offeror's prior advisory and assistance service to the Laboratory?
- Will performance of the current subcontract result in the offeror having an unfair competitive advantage in a future subcontract?

Note: An unfair competitive advantage does not include the normal flow of benefits from the performance of a subcontract. While an incumbent subcontractor may have a competitive advantage, it does not have an "unfair" competitive advantage.

### **Examples**

Examples of OCI situations, and general guidance regarding their resolution, include, but are not limited to:

Example 1: In the performance of a subcontract for a study, the subcontractor is given information about Laboratory plans for future acquisitions. This information is not available to others.

Guidance: Normally the subcontractor should not be permitted to compete for follow-on work relating to such plans, as this would constitute an OCI.

Example 2: In response to a Request for Proposal (RFP), Offeror A proposes to undertake certain analyses of an energy savings device. The offeror is one of several companies considered to be technically well-qualified. In response to an inquiry in the RFP, offeror A advises that it is currently performing similar analyses for the manufacturer of the device.

Guidance: Normally this would constitute an OCI, and a subcontract would not be awarded to offeror A because it would be placed in a position in which its judgement could be biased in relationship to its work for the Laboratory.

Example 3: Company A prepares updated government specifications for a refrigerator to be procured competitively.

Guidance: Normally this would constitute an OCI, and Company A would not be allowed to compete for supply of a refrigerator

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based upon the specification it prepared.

Example 4: Consulting Firm A derives a substantial portion of its income from Company B in connection with the study of natural gas production. Company B is also heavily involved with motor gasoline marketing. Consulting Firm A discloses these facts in response to an RFP for a study of motor gasoline marketing.

Guidance: Normally this would constitute an OCI, and a subcontract for the study of motor gasoline marketing plans would not be awarded to Consulting Firm A because it would be placed in a position in which its judgement could be biased.

### **Follow-Up if No OCI Exists**

If, after a thorough review of all relevant information, the procurement specialist and his/her procurement supervisor determines that no OCI exists, he/she will document the subcontract file accordingly and award the subcontract with the *Organizational Conflicts of Interest* clause included.

### **Avoiding or Neutralizing an OCI**

If an actual or significant potential for organizational conflict of interest is determined to exist, the procurement specialist will determine if it can be satisfactorily avoided (i.e. eliminated) or neutralized (i.e. rendered ineffective) with the result that there is little or no likelihood of an OCI.

Specifically drafted clauses that supplement and expand provisions of the standard OCI clause may be used to avoid or neutralize an OCI. Examples of the types of clauses that may be employed include, but are not limited to, the following:

- Hardware exclusion clauses that prohibit the award of hardware subcontracts following a related design subcontract previously performed by the subcontractor;
- Clauses that provide for the protection of the confidentiality of data and guard against its unauthorized use;
- Non-Disclosure Agreements for key personnel, or personnel who have access to specified information;
- Clauses that prohibit other segments or divisions of the subcontractor from becoming involved in the performance of the subcontract work or being in a position to influence such work;
- Clauses that restrict the successful offeror on the current solicitation from participation in subsequent acquisitions; or
- Clauses that require the subcontractor (and/or certain of its key personnel) to avoid conduct that may result in an OCI.

After avoiding or neutralizing an actual or potential OCI, the procurement specialist will document the avoidance or

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neutralizations action(s) in the subcontract file, and then, with his/her procurement supervisor's approval, award the subcontract with the *Organizational Conflicts of Interest* clause included.

### **Mitigating an OCI**

If an actual or significant potential for organizational conflict of interest cannot be avoided or neutralized, and if award to the apparent successful Offeror is still in the best interest of the Laboratory, the procurement specialist may explore ways to mitigate (i.e. reduce, but not fully eliminate or neutralize) the OCI. Mitigating an OCI will be done rarely, and only in unusual circumstances. Such an action requires the Procurement Manager and Laboratory Counsel to agree with the proposed mitigation plan before it is submitted to DOE for approval. A mitigation plan should include a thorough discussion of what efforts will be made to avoid or neutralize the OCI, and explain why these efforts will still not fully eliminate the OCI, or render it completely ineffective. The plan should also explain why it is in the Laboratory's best interest to award the subcontract to a subcontractor with a mitigated OCI. The plan should include the specific, special subcontract clauses that will be used to mitigate the OCI, and explain how these clauses will be implemented by the Subcontractor and how the Subcontractor's implementation of the plan will be monitored by the Laboratory.

After the OCI mitigation plan has been approved by DOE, the procurement specialist will include the mitigation plan in the subcontract, and then award the subcontract with the *Organizational Conflicts of Interest* clause included.

### **Awarding a Subcontract Notwithstanding a Known OCI**

If an actual or significant potential for organizational conflict of interest cannot be avoided, neutralized, or mitigated, and if award to the apparent successful Offeror is still in the best interest of the Laboratory, the procurement specialist may decide to pursue award anyway. Such a decision will be extremely rare, and be pursued only in exceptionally unusual situations. It requires that the Procurement Manager and Laboratory Counsel both concur with the decision before DOE is asked to approve it. Within DOE, the decision to waive the OCI requirement shall be made by no less a level than the DOE Head of the Contracting Activity.

After receiving DOE's approval, the procurement specialist will document the subcontract file with the reasons for awarding the subcontract notwithstanding a known OCI, and then award the subcontract with the *Organizational Conflicts of Interest* clause included.

### **Modifications**

When a significant modification is made to a subcontract, the subcontractor must submit a new *OCI Disclosure*, providing any relevant facts that have come into existence since the date of the

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previous *OCI Disclosure*. The procurement specialist will process the new *OCI Disclosure* in the same manner as he/she processed the original *OCI Disclosure*.

### **REVIEWS/ APPROVALS:**

#### **Laboratory Counsel**

Laboratory Counsel may be consulted for assistance at any time. If it becomes necessary to obtain DOE approval, either to mitigate an OCI or award a subcontract notwithstanding a known OCI, Laboratory Counsel must review and concur with the decision before DOE is asked to review and approve it.

#### **DOE**

DOE approval is required whenever an actual or potential OCI is subject to a mitigation plan, or whenever award will be made notwithstanding a known OCI (i.e., a waiver of the OCI requirement). An OCI waiver must be approved by no less a level than the DOE Head of the Contracting Activity.

### **RESPONSIBILITIES:**

#### **Procurement Specialist**

The procurement specialist shall:

- Review the purchase request to determine if the proposed work involves advisory and assistance services;
- Obtain a completed *Pre-Procurement Fact Sheet* form from the requester if necessary;
- Include the appropriate OCI clauses in the solicitation if the work will involve advisory and assistance services and the award is expected to exceed the small purchase threshold;
- Ask the apparent successful Offeror to submit the required OCI disclosure information;
- Review and evaluate all relevant information and, in consultation with the requester, determine if an actual OCI, or the significant potential for an OCI, exists;
- Determine, in consultation with the requester, how to avoid, neutralize or mitigate the OCI;
- Document the OCI avoidance or neutralization action(s) in the subcontract file, and with the procurement supervisor's approval, award the subcontract
- Obtain the approval of the Procurement Manager, Laboratory Counsel, and DOE if a mitigation plan is required, or if award is to be made notwithstanding a known OCI;
- Request and process a new OCI disclosure whenever a



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significant modification is made to a subcontract;

- Include the *Organizational Conflicts of Interest* clause in all subcontracts that involve advisory and assistance services;
- Document the subcontract file regarding all reviews, determinations, and actions relating to OCIs.

**Procurement  
Manager**

The Procurement Manager must review and concur with the decision to mitigate an OCI or award a subcontract notwithstanding a known OCI whenever such decisions are deemed to be in the best interest of the Laboratory.

**Requester**

The requester will:

- Complete the *Pre-Procurement Fact Sheet* form if requested to do so by the procurement specialist;
- Assist the procurement specialist in determining if an actual OCI, or the significant potential for an OCI, exists;
- Assist the procurement specialist in determining how to avoid, neutralize or mitigate the OCI.

**REFERENCES:**

Prime Contract Clause I.66, Organizational Conflicts of Interest, Alternate I

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<b>STEP 1:</b> Review purchase requests to determine if the work falls within the definition of “advisory and assistance services.” Use the statement of work and other available information to make this determination.	<p>If it does Document this determination in the subcontract file, then go to step 3.</p> <p>If Uncertain Send the <i>Pre-Procurement Fact Sheet</i> form to the requester, then go to step 2.</p> <p>If it doesn't Document this determination in the subcontract file. No further OCI action is required.</p>
<b>STEP 2:</b> Review the completed <i>Pre-Procurement Fact Sheet</i> form, statement of work, and other available information to determine if the work is “advisory and assistance services.”	<p>If it is Document this determination in the subcontract file, then go to step 3.</p> <p>If it isn't Document this determination in the subcontract file. No further OCI action is required.</p>
<b>STEP 3:</b> If expected to exceed the small purchase threshold, include both the <i>OCI</i> clause and the <i>OCI Disclosure - Advisory and Assistance Services</i> clause in the solicitation.	Go to step 4.
<b>STEP 4:</b> Obtain the required disclosure statement from the apparent successful Offeror and review it to determine if the interests disclosed present actual or significant potential for an OCI.	<p>If they do Document this determination in the subcontract file, then go to step 5.</p> <p>If they don't Document this determination in the subcontract file. No further OCI action is required.</p>
<b>STEP 5:</b> Determine if there are appropriate action(s) that can be taken to satisfactorily avoid, neutralize, or mitigate actual or significant potential for an OCI. Allow the Offeror an opportunity to participate in this process.	<p>If the OCI can be avoided or neutralized: Document this determination in the subcontract file. Assure that the necessary action(s) to avoid or neutralize the conflict of interest is (are) taken, then award the subcontract.</p> <p>If the OCI can only be mitigated: Go to step 6.</p> <p>If the OCI can't be avoided, neutralized or mitigated: Go to step 7.</p>
<b>STEP 6:</b> If award to the apparent successful Offeror is still in the best interest of the Laboratory, prepare a mitigation plan. After obtaining Laboratory Counsel's concurrence with the plan, submit it to DOE for approval.	<p>If DOE approves: Document this determination in the subcontract file. Assure that the necessary actions(s) to mitigate the conflict of interest is(are) taken, then award the subcontract.</p> <p>If DOE disapproves: Go to step 7</p>
<b>STEP 7:</b> Determine if award to the apparent successful Offeror is still in the best interest of the Laboratory notwithstanding the inability to avoid, neutralize, or mitigate the conflict of interest.	<p>If it is Go to step 8.</p> <p>If it isn't Disqualify the apparent successful Offeror, then return to step 4 with the firm next in line for award.</p>
<b>STEP 8:</b> Request DOE's approval to award to the apparent successful Offeror notwithstanding the inability to avoid, neutralize, or mitigate the conflict of interest.	<p>If DOE approves: Document this determination in the subcontract file, then award the subcontract.</p> <p>If DOE disapproves: Disqualify the apparent successful Offeror, then return to step 4 with the firm next in line for award.</p>